APPEAL NO. 93422

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas on April 29, 1993 to determine the following issue as agreed to by the parties: whether the claimant had disability because of an injury of (date of injury). The appellant, hereinafter carrier, appeals the determination of hearing officer, (hearing officer), that claimant had disability from September 21, 1991 through November 13, 1991, and December 13, 1991 through the date of the hearing, and that the claimant's disability was due to his (date of injury) compensable injury rather than a horseplay incident on September 20th or a subsequent injury on December 13th.

DECISION

We affirm the decision and order of the hearing officer.

It was not in dispute that the claimant, who worked for (employer), injured his back in the course and scope of his employment on (date of injury). He was seen the same day by (Dr. MD), who diagnosed lumbar strain. The claimant testified that he returned to work but was told not to lift anything heavy; however, after four or five days Dr. MD took him off work and began a course of physical therapy.

On September 17, 1991, the claimant was released to return to work. (The claimant testified that he was released to light duty work, although a September 17th "work ability report" signed by a physical therapist gave claimant's work status as "return to regular work.") On that date his physical therapy progress notes also stated that the claimant had "improved both increasing AROM in the lumbar region as well as strength . . . . In addition, [claimant] is complaining of decreased pain both in intensity and frequency as well as a more centralization of pain over the left PSIS." The claimant testified that as of that date his back had improved but was still swollen. Claimant worked every day from September 17th through September 20th. On the latter date, near the end of his shift, he got into an altercation with a coworker, (Mr. M), which culminated in claimant's being pushed and falling to the ground. (The claimant said he fell on his hands and not on his back.) The claimant denied that he experienced new or different pain from this incident, but rather that he continued to have the same back pain he had had before. In a signed transcription of Mr. M's statement, he said he pushed claimant, who fell to his knees; he said when claimant got up he did not rub his back or otherwise indicate he was in pain. A signed transcription of the statement of another coworker, JA, answered affirmatively the question of whether claimant said that his back hurt from Mr. M pulling him down to the floor. The following day the claimant told his supervisor he was in pain and was allowed to leave work early.

On Monday, September 23rd, he returned to Dr. MD, who claimant said performed some tests then told him to return home. Physical therapy patient notes of September 23rd state in part as follows: "[Claimant] returns to the clinic today with complaints of increasing pain over the course of last week with working. [Claimant] reports that by September 21,

1991, he was unable to work due to increasing pain across the entire low back and into the left buttocks and down the left posterior thigh. [Claimant] reports that at the present time pain is constant but is worsened with sitting, forward flexion and extension of the trunk."

The claimant remained off work until he was released by Dr. MD on November 15th, although he said he continued to have the same pain at that time. A November 15th subsequent medical report from Dr. MD said claimant was released but not to full duty; it also said claimant's treatment was not completed due to the carrier's "refusal to pay existing bill."

Claimant worked until December 13th, when he said he again felt pain in his back while turning a motor he was painting. At this time the employer sent him to (Dr. MC). Dr. MC's patient notes of December 17th report in part as follows: "[Claimant] says that he injured his lower back in a work related incident on or about 10-22-91 (sic) . . . his initial injury occurred as a result of lifting a motor. [Claimant] says that he noted the immediate onset following that of his present chief complaints which are continuous lower back greater than intermittent left posterior thigh pain. [Claimant] says he initially improved following the injury and returned to work but reinjured himself approximately four days ago . . . ." Upon examination, Dr. MC found claimant to move slowly and stiffly, but said his examination and radiographs were basically unremarkable.

The claimant testified that the pain he felt in December was at the same location in which he experienced pain after the August incident. He also said he told Dr. MC that he had felt pain since August. Claimant treated with Dr. MC until January of 1992; he said he had not been able to have further studies as recommended by Dr. MC because the carrier had stopped paying medical benefits. He said he went to Parkland Hospital in May of 1992 because of his back pain, which he said he continued to experience at the time of the hearing.

In its appeal, the carrier alleges error in the hearing officer's determination that neither the September 20, 1991, horseplay incident nor the December 13, 1991, injury are the sole cause of claimant's present disability, and that claimant has disability due to his compensable injury of (date of injury) for the periods September 21 through November 13, 1991, and December 13, 1991 through the date of the hearing (carrier does not challenge the hearing officer's determination that the claimant had disability for the period August 27 through September 16, 1991). The carrier contends that the findings and conclusions on these points are against the great weight and preponderance of the evidence. The carrier further contends there is no evidence to support the hearing officer's finding that the claimant has remained off work since December 13, 1991, because of a back injury.

The 1989 Act defines disability as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-

1.03(16). The issue of whether a claimant's disability was the result of a compensable injury or a subsequent, intervening event is a question of fact for the hearing officer to determine. Likewise, while the aggravation of a previously existing condition or injury can be considered a compensable injury in its own right, whether the claimant sustained such an aggravation or merely suffered a continuation of an original injury is a question for the fact finder. The Appeals Panel will overturn the decision of the hearing officer on this issue only where the evidence supporting the determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). *See* Texas Workers' Compensation Commission Appeal No. 92079, decided April 14, 1992 (recurrence of claimant's tenosynovitis held to result from original compensable injury and not intervening incident); Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992 (recurring knee problems held to arise from original incident and not an aggravation).

Our review of the record discloses sufficient evidence upon which the hearing officer could have based his decision that claimant's disability was due to a continuation of the effects of his August 22nd injury rather than the incidents on September 20th or December 13th. With regard to the altercation, the claimant testified that it caused him no new pain, and that he continued to have the same back pain as before. This statement was in conflict with the statement of his coworker; however, it is somewhat buttressed by the September 23rd therapy report indicating increasing pain over the period of the week in which he had returned to work. The medical report in evidence following claimant's reports of pain on December 15th is not very enlightening as to whether the claimant's complaints were due to the August injury or to a new event. However, the claimant testified that his pain was the same, and occurred at the same location, as before. As this panel has previously noted, a claimant's testimony alone can establish issues of injury and disability, even where contradicted by medical evidence. *See* Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992, and cases cited therein. Upon our review of the record, we hold there was sufficient evidence to support the hearing officer's determination that claimant's disability was the result of his compensable injury of (date of injury).

The carrier has alleged that there is no evidence to support the hearing officer's finding that the claimant "has remained off work since December 13, 1991, because of a back injury" (presumably the compensable injury). In determining whether there is evidence of probative force to support a finding, the reviewing body must consider only the evidence and inferences tending to support the finding and disregard all evidence and inferences to the contrary. Garza v. Alviar, 395 S.W.2d 821 (Tex. 1965).

As this panel has previously held, the 1989 Act does not limit the evidence that may be relevant upon the issue of disability. Texas Workers' Compensation Commission

Appeal No. 92202, decided July 13, 1992. Further, as noted earlier, the testimony of a claimant alone may be sufficient to establish disability. Appeal No. 92167, *supra*; Director, State Employees Workers' Compensation Division v. Wade, 788 S.W.2d 131 (Tex. App.-Beaumont 1990, writ denied). We have also acknowledged that determining the end of disability within the meaning of the 1989 Act can be a difficult and imprecise matter; however, this panel has not required an employee under a conditional medical release to show that employment is not available. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

While the evidence below is minimal with regard to claimant's continuing disability, we cannot say it is non-existent. The claimant had been taken off work by Dr. MD, then given a restricted release to work in November prior to completion of treatment due to carrier's apparent denial of medical benefits. Apparently claimant was not able to pursue treatment with Dr. MC past January of 1992 for the same reason. The claimant attempted unsuccessfully to return to work after his injury, and at least one medical report states that doing the work caused him continued pain. The claimant testified at the hearing that he continued to have pain. All the foregoing constitutes evidence upon which the hearing officer's determination of disability could have been based.

We would note that the evidence in this case was conflicting and would have supported different inferences than those reached by the hearing officer. However, the fact that the fact finder might have arrived at other inferences and conclusions does not justify the setting aside of his determination of those facts he concluded to be the most reasonable. Holly Sugar Company v. Aguirre, 487 S.W.2d 421 (Tex. Civ. App.-Amarillo 1972, writ ref'd n.r.e.).

Finally, the carrier argues that the hearing officer applied an incorrect standard of proof in considering whether the two events subsequent to claimant's compensable injury were the sole cause of his disability. Clearly, if a subsequent injury were alleged to be the sole producing cause of disability, this fact must be established. Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. However, a failure to establish another event as the sole cause of a claimant's disability would not relieve the claimant from his burden of proof to establish that disability exists. In addition to the hearing officer's findings of fact and conclusions of law with regard to sole cause, however, the hearing officer also found and concluded that claimant had disability for the periods of time in question due to his compensable injury of (date of injury)--i.e., that

the claimant had met his burden of proof. Therefore, we find no error on the part of the hearing officer in making the challenged findings and conclusions.

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

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Thomas A. Knapp
Appeals Judge